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91-400

Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

(_____term, 19_____)

GEORGE B. BUTLER and wife, LEAH BEA BUTLER
Plaintiffs,

vs.

BUICK MOTOR COMPANY, A DIVISION OF GENERAL MOTORS CORPORATION, and STATE OF TENNESSEE,
Defendant

(Petition for review of a Final Decision of the State Courts of Tennessee)

PETITION FOR WRIT OF CERTIORARI

RESPECTFULLY SUBMITTED

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(a) QUESTIONS PRESENTED FOR REVIEW

(1) Does a purchaser for value of a motor vehicle from a recognized and licensed salvage dealer, who applies for and obtains a certificate of title from the state have a constitutionally protected property interest in that vehicle?

(2) Would the good faith purchaser for value of an automobile from a recognized salvage dealer, who applied for and obtained a certificate of title from the state of Tennessee, which certificate of title was only issued by the state after checking with the manufacturer to determine that the vehicle was not stolen, have superior claim to the vehicle over the manufacturer, General Motors Corporation, if it developed that the vehicle had actually left General Motors possession and control and their title surrendered as a result of the dishonesty of its principal supervisory official at the Milford Proving Ground to whom the vehicle was specifically entrusted for the purpose of scrapping?

(b) **PARTIES TO THE PROCEEDINGS**: The only parties to this proceeding are those reflected in the heading, being George B. Butler and wife, Leah Bea Butler and Buick Motor Company, division of General Motors Corporation.

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(1) Fifth Amendment, United States Constitution

(2) Section 1, Fourteenth Amendment, United States Constitution

(3) 42 U.S.C.S., Section 1983

(4) 42 U.S.C.S., Section 1985 (3)

(5) Article 1, Section 17, Constitution of Tennessee

(6) Article 1, Section 21, Constitution of Tennessee

(7) Tennessee Code Annotated, Section 55-5-108, et seq.

(d) REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS:

The case references of official opinions in this case will be Butler et ux., v. Buick, Coffee County Chancery Action No: 86-164 and Court of Appeals Docket No: 01-A-01-9003-CH-00101; and George B. Butler, et ux, Leah Bea Butler vs. Buick Motor Company, a division of General Motors Corporation, Coffee Circuit No: 21,881 and U.S. District Court for the Eastern District of Tennessee, Winchester Division, CIV No: 4-87-088.

(e) STATEMENT OF JURISDICTION

(1) The order, which is actually sought to be overturned is that of the Court of Appeals for the Western Section of Tennessee, sitting for the Middle Section, entered February 6, 1991.

(2) A timely petition to rehear was filed, which petition was denied on February 27, 1991. Thereafter, a timely application to appeal to the State Supreme Court was filed, which application was denied by Order entered June 10, 1991, which is the triggering date for the petition for certiorari to this Honorable Court.

(3) Authority for the Writ of Certiorari in this case is found in 28 U.S. Code Section 1257.

(4) The substance of the underlying cases involved in this litigation is the taking of a motor vehicle, which the Plaintiff, George and Lea Butler had purchased from Gaylen Fann, a recognized and licensed dealer of automobiles, both new and used and scraped, by the Defendant company, through the aid of the state of Tennessee law enforcement agency, without the providing of any due process hearing or any other proceeding to protect their constitutional right of property in the automobile. Two litigations came from this

circumstance, one filed in Chancery Court to recover possession of the automobile itself and a second action filed in Circuit Court, both courts of Coffee County, Tennessee to obtain damages for the wrongful taking of the property through the aid of the state law enforcement authorities without due process. The Circuit Court action was removed to Federal District Court. An Agreed Order was entered in the respective cases authorizing the taking and utilization of discovery to apply in both cases. In other words, the respective cases involve both parties and by agreed order, all discovery taken in the respective cases would be subject to utilization in both cases. Thereupon all discovery was taken under the duplicate heading. A Motion for Summary Judgement was made in Federal District Court contending that the automobile constituted stolen property and as such there could be no property interest in the vehicle. The case proceeded to trial in Coffee County Chancery Court for determination of who the proper owner of the vehicle was or who had better title, the Plaintiff or the Defendant. The Chancellor, after the trial on the merits in Coffee County Chancery Court ruled that the vehicle was not stolen property in the normal sense of the word and since a supervisory official of General Motors, by his action, being entrusted with vehicle had caused it to be placed in the stream of commerce and ultimately sold to the Plaintiffs as good faith purchasers for value. The Chancellor ruled that the Plaintiffs had superior title to the vehicle and ordered the return of the vehicle from General Motors to George and Bea Butler. The car had been taken in June of 1986, and it was approximately a little over three (3) years later that the Chancery Court ordered the return of the vehicle. It had been sitting in storage in the possession of Buick ever since its taking by the state of Tennessee. The District Judge, after the ruling by the Chancellor, held that the determination was binding as to whether or not the vehicle was stolen and concluded that issue in the Federal proceeding as well. The Defendant appealed the case to the Court of Appeals of the state of Tennessee, Middle Section and the Federal

District Judge in relation to the Federal case, entered an Order continuing the case until the completion of the appellate process in the state action. The federal action is the proceeding in which the Plaintiffs seek to recover for the violation of their constitutional rights in relation to their property, but by the order of the Federal District Judge, his ruling will be contingent upon the outcome of the state case for possession. The Court of Appeals for the Western Section of Tennessee, apparently without the entrance of an order as required by the rules, heard the case for the Middle Section and entered an Order overturning the Chancellor. The Plaintiffs filed a petition to Rehear, which was denied and thereafter applied to the State Supreme Court for review, which application was denied. As a result, under the current status of the rulings, this holding by the Court of Appeals overturning the Chancellor will not only serve to terminate the Plaintiffs claim for recovery of the vehicle, but also his suit for damages for the violation of his Constitutional Rights. Therefore, relief of this Court is necessary to determine the application of constitutional rights and the Plaintiffs property interest in the automobile as a bona fide purchase for value of a vehicle properly titled in the state of Tennessee.

(f) APPLICABLE PROVISIONS OF THE CONSTITUTION AND STATUTES

(1) "Criminal actions - Provisions concerning - Due process of law and just compensation clauses. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by the grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fifth Amendment
United States Constitution

(2) "Citizenship - Due process of law - Equal protection. - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1, Fourteenth Amendment
United States Constitution

(3) "Civil action for deprivation of rights - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ..."

42 U.S.C.S., Section 1983

(4) "(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

42 U.S.C.S., Section 1985 (3)

(5) "Sec. 17. Open courts - Redress of injuries Suits against the State. - That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the

Legislature may by law direct."

Article 1, Section 17
Constitution of Tennessee

(6) "Sec. 21. No man's services or property taken without consent or compensation. - That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

Article 1, Section 21
Constitution of Tennessee

(7) "55-5-108. Records to be kept - Inspections - Contraband - Seizure of stolen property - Reclamation - Forfeiture.

Tennessee Code Annotated
Section 55-5-108, et seq.

(g) CONCISE STATEMENT OF MATERIAL FACTS

General Motors is a huge corporate entity with divisions making several different types of motor vehicles one being Buick. General Motors or Buick has testing facilities at Milford Proving Grounds in Michigan (Tr. 412-413) (Tr. 441-443). The General Supervisor of those Buick proving grounds at the time in question was a Jack Clingingsmith, who had supervision over approximately 300 people, which included other supervisors under his control and also drivers and those connected with the testing and ultimate removal or elimination of vehicles (Tr. 425-426) (Tr. 419-421). According to Buick officials and

engineers, certain vehicles made by Buick were utilized for testing purposes or also for yard cars in and around the facilities. Other vehicles by them are utilized by Buick officials to ride and try out when a new type vehicle is being tested. According to Buick officials, the vehicle in question was one that Buick officials were trying out and thus was utilized by Buick officials for a period of time. After completion of such at Flint, Michigan, the fleet coordinator of Buick, Mr. Barcome, sent the vehicle to the Milford Proving Grounds to the attention of Jack Clingingsmith, Buick general supervisor at Milford for the purpose of scrapping or ultimately destruction of the vehicle (Tr. 419-421) (Tr. 425).

The practice of General Motors or Buick when they scrap a vehicle as was the practice in this case, is that they would do so only when they had completed all the utility that they sought to obtain from the vehicle and would at that time remove the VIN plate from the car, surrender the title of the vehicle back to the Michigan Secretary of State and then arrange for a private company to crush the vehicle and remove the crushed scrapped parts or metal of the vehicle from their facilities. Where and what the scrap man did with the metal was not known or of no concern to Buick, but the vehicle would be totally removed from Buick's possession and control and Buick would have nothing, no possession further of the vehicle or any of its parts. It appears in this case, that the particular car as indicated above was sent by the fleet coordinator, Mr. Barcome, who was located at Flint, Michigan, to Milford Proving Grounds and in particular to general supervisor, Jack Clingingsmith for such destruction. Mr. Clingingsmith had general supervision over the operations at the proving grounds including the destruction of the vehicles and the documentation for that destruction. It was Buick's intention at this stage having completed their utilization of the vehicle to have no longer possession of the vehicle or any of its parts. The title to the vehicle was surrendered to the state of Michigan. The VIN plate was removed under the control and supervision of Jack Clingingsmith, but apparently in this case, Mr.

Clingingsmith did dispose of the vehicle, but he this time disposed of it without first crushing the vehicle (Tr. 419-421) (Tr. 425). Had he carried out what Buick officials testified was their intent, the vehicle would have totally parted from Buick's control, but would have been in a crushed state, but in any event in whatever form it was in, Buick would not have it anymore. It appears that the vehicle was actually transferred from Buick under the direction of Jack Clingingsmith in a whole state rather than a crushed state. As Buick intended, it parted with possession of the vehicle just in a different form. Investigation disclosed that Mr. Clingingsmith transferred the vehicle to Mr. Holloway, who was a salvage dealer in the Michigan area. Investigation disclosed that these three individuals, Clingingsmith, Nicolay and Holloway worked together in that regard (Tr. 447-449).

Test vehicles are often available for sale and are acquired by dealers such as Mr. Fann, and test vehicles of most type motor vehicles have been available in the Michigan area for years (Tr. 109).

Gaylen Fann is a reputable automobile and salvage dealer in the Coffee County area and has been in business for many years buying and selling large quantities of late model vehicles with anywhere from minor defects to needing complete reconstruction. They buy cars from insurance companies, where they have been wrecked or buy test vehicles where they are available or buy fleets of vehicles where there would be flood or disaster in the area with a range of damage to the vehicles. Gene Taylor worked with Fann over a period of sixteen (16) to eighteen (18) years. Fann's operation is located in Coffee County, Tennessee, and Gene Taylor while working with him would generally work a particular state or states buying cars where there were quantities available, such as Michigan or Louisiana and then after buying the cars would ship them to Fann's operation in Coffee County, from which they would be sold. In the course of his transactions, it would be normal also to buy cars from other salvage dealers. To indicate the size and

type of operation according to Mr. Taylor's testimony, he had bought and sold through Fann's operation as many as 1,500 cars a year. On many of the transactions, Mr. Taylor worked really as an employee of Gaylen Fann, but on a number of the purchases throughout the years, they worked as partners with the two working together and sharing profits or losses associated with the transaction (Tr. 104-4). During this period of time, Gene Taylor was working primarily in Michigan and learned of the availability of some approximately 20 late model test vehicles, that were primarily Buicks. He learned of these from a friend or acquaintance that he knew in the car business by the name of Jack Kruppa. Taylor checked with Fann to see if he would be interested in acquiring the vehicles, and he was, and they agreed to proceed on this venture together, sharing in the profits or losses (Tr. 107-110). The transaction as herein described was one that was just a relatively minor transaction in the normal course of the salvage business that Fann operated. Kruppa did not actually have the vehicles themselves, but could get them from Holloway. Holloway was a recognized dealer. Kruppa confirmed the validity of the vehicles to Taylor, and Taylor bought them on behalf of himself and Fann's business. Kruppa then in turn would actually make a profit on the transaction in that he would obtain the vehicles from Holloway and transport them to the state of Tennessee to Fann's business operation in Coffee County (Tr. 107-110). As indicated, there are approximately 20 vehicles total, one of which was the vehicle ultimately purchased by the Butlers, which is subject of this litigation, and it appeared from the proof and the investigation that each of the vehicles passed through this same process conducted by General Motors by which then the vehicles were ultimately placed in the market by Jack Clingingsmith, Buick's general supervisor at Milford Proving Grounds (Tr. 447-449). Acquisition of these vehicles and the handling of these vehicles was carried on by Fann and Taylor in the normal fashion for their type of business and in accordance with the laws under which they operate. Once

a particular vehicle was brought to the state of Tennessee, Fann made application to the state for the appropriate documents of title utilized in his business for such vehicles. These documents of title are technically labeled permits to dismantle, but not only authorize him as a salvage dealer to dismantle, the vehicle, or reconstruct them with other vehicles, but also authorize him to transfer ownership of the vehicles to a purchaser such as Mr. Butler (Tr. 151-9, 306-7). Most vehicles obtained in this fashion will have a VIN plate on them, however it is not unusual for vehicles to be obtained in some appropriate fashion such as this with the VIN plate removed (Tr. 151-159). When this is the case, there are provisions under the law of the state of Tennessee for a new VIN plate to be issued. All proper course and applications appropriate to be done in such a situation were done by Fann to secure proper documents of title to the vehicles (Tr. 306-307).

The vehicles were not all acquired at the same time or not all sold at the same time, but once Fann started submitting the normal applications to the Department of Safety, the department and in particular Pat Ethridge started investigating the vehicles to determine whether or not to issue title. She acknowledged in her testimony that before the department can issue title to a vehicle, they must check to determine if it is stolen, and they can only issue the title after they have completed their investigation and determined that it is not a stolen vehicl. (T.C.A. Section 55-3-201, 55-3-207). In this case the Department of Safety went above and beyond the normal to make sure that the vehicles were not stolen. The state of Tennessee like the state of Michigan has a process by which when a vehicle is scrapped, the original title or old title to the vehicle is turned in if it is scrapped and that title can never again be utilized (Tr. 307). A new owner who receives or reconstructs the car may then obtain a reconstructed title, which would be the new manner and means of ownership of that vehicle, and the old title has no more force and effect (T.C.A. 55-3-110, 55-3-112). Not only did the state of Tennessee in this case check NCIC

to confirm that the vehicles were not listed as stolen, but since these were General Motors' product automobiles, and in particular Buick's, Ms. Ethridge contacted Buick to make sure that it had no claim to the vehicles. It was not until after waiting an extended period of time, and Buick having made no claim to the vehicles that the Department of Safety then under the statute had determined that the vehicles were not stolen and proceeded to issue titles on the various vehicles which included a permit to dismantle to Fann on each of the vehicles and subsequently respective titles to the respective purchasers, such as Mr. and Mrs. Butler (Tr. 289-294) (Tr. 300-303).

Plaintiffs, George and Bea Butler are residents of Manchester, Coffee County, Tennessee, and have lived here for a number of years. Mr. Butler is a lead designer with Calspan Corporation working at Arnold Engineering Development Center at Arnold Air Force Base, Tennessee. Bea Butler is an official at the People's Bank and Trust Company in Manchester. Mr. Butler was well familiar with Fann's type of operation and knew his sound reputation for honest and fair dealing in his line of business. Mr. Butler in addition to his regular occupation is handy with mechanical aspects of a vehicle and capable of doing reconstruction work on vehicles. Prior to this transaction, he had purchased nine (9) other vehicles from Fann, one of which was a flood vehicle which he and his wife totally disassembled, cleaned and reassembled (Tr. 23-31). When he learned that Fann had acquired or was acquiring some test vehicles, he went to his lot in Manchester and saw a 1985 Park Avenue Buick, which on the surface was grubby and filthy and jacked up in the back, but Mr. Butler saw its potential as a diamond in the rough (Tr. 32). After purchasing the vehicle, Mr. Butler and his wife completely went over the vehicle, cleaning and repairing electrical contacts and relubricating where it needed it, cleaning the upholstery and brought the vehicle to the point where it was showroom perfect (Tr. 37-40). They got it cleaned up so nicely that they put towels on the seats so that they wouldn't get the seats dirty and kept

using those towels on the seats until the car was taken from them. Mr. and Mrs. Butler paid $9,500.00 for the vehicle on an "as is" condition, then spent a multitude of hours in time making it into the show vehicle they knew it could be (Tr. 37-39).

Mr. Butler, then in the process of redoing the car and caring for it in the fashion that he did, made several contacts with Buick or Buick representatives to gain further information about his car. He exchanged written correspondence with Buick and made phone communications with a local dealer and directly with the Buick Corporation Service Center about finding the automatic key code in the trunk and in the process providing them with the information about his car. Still no claim by Buick (Tr. 45-49).

Ultimately and some time after the initial contacts with the state of Tennessee which occurred first in about March or April of 1985, Buick did an internal investigation and came to the conclusion that Mr. Butler's car and, in fact, some of these other cars that had been purchased and sold by Fann were vehicles that had once been owned by Buick and were supposedly scrapped, and the documentation showed that they were scrapped. Ultimately Buick officials determined that although their agent and employee, who was in fact their supervisor at the proving ground and head of the operation and personnel who would see to the scrapping and disposal of the vehicles, had arranged for the disposal of the vehicles but not in the form that Buick had intended. It would appear that at first they were only concerned with whether or not they would be liable in case any untested and unapproved parts of the vehicle would be on the roadway (Tr. 400-407). Contact was made with Gene Taylor, since he was the one that acquired the vehicles, and they told him that they might need to get some of the vehicles back, and they wanted his help to reacquire the vehicles from the purchasers. Mr. Taylor cooperated with them as to locate all the vehicles. He was assured that if they needed to reacquire the vehicles, they would go through him to do so (Tr. 110-116). The security representative, Mr. Marler, made contact

in Tennessee with the District Attorney, serving this area, about the vehicles and was allegedly concerned at the first juncture about any liability that Buick might have if some unsafe vehicles or part had gotten on the roadway. Buick officials disclosed to Buck Ramsey, the district attorney, that the man, Mr. Clingingsmith, who had apparently put the vehicles into the stream of commerce had the authority to dispose of the vehicles, but he just was not supposed to have disposed of them in the manner that he did. Later, apparently Buick officials changed their mind and wanted to treat the vehicles as stolen vehicles and again approached the District Attorney about the vehicles. The DA told Buick officials that under the circumstances, he would not consider the cars stolen vehicles and would not treat them as such (Tr. 193-196). Don Duncan was the head of the Commercial Enforcement Division also known as Motor Vehicle Enforcement and State Auto Theft Units for the Department of Safety holding the title of Colonel and was two levels above Pat Ethridge. He in essence was the head of that department. He confirmed that with the type of operations that were included under his department was supervision over salvage yards such as Gaylen Fann's operation, and that in the course of such operations, one would acquire the vehicles without VIN plates. He confirmed that Fann had gone through all the proper channels to obtain documents of title. T.C.A. 55-3-203. He likewise testified that under the facts as they were presented to him, that the vehicles in question would not constitute stolen vehicles (Tr. 151-159). Billy Thomas was at that time head of the Regional Field Office of the FBI serving a multi-county area including Coffee County. At the request of the FBI in Michigan, he opened an investigative file on the matter, and he in his official capacity with the FBI did not consider the vehicles as stolen vehicles (Tr. 208-232). When the officials at Buick wanted to treat the cars as stolen vehicles and just have them picked up as opposed to having to purchase them from the owners, and they were unsuccessful in getting the help of the attorney general to treat them as stolen cars (Tr. 193-

196), they and law enforcement contacts in Michigan made contact with lower level officials in the Tennessee Department of Safety levels below Col. Duncan and requested the state's aid in picking up the cars as stolen vehicles. These officials then at the request of Buick sent J.C. Northcutt, an official with the Department of Safety Auto Theft Division to Coffee County with Buick officials, and Mr. Northcutt proceeded to take possession of the various vehicles. In regard to this particular vehicle, Mr. Northcutt came to Mr. Butlers' place of employment at AEDC and told him that he was driving a stolen car and that he had "come after" it. He followed Mr. Butler to his residence to get the personal property out of the vehicle including the towels that they used to cover the seats. The car was now in show place quality unlike it was when Mr. Butler purchased it. Agent Northcutt testified that his basis of picking up the Butler vehicle was it being listed as stolen in NCIC; but both he and Pat Ethridge had both "lost" their copies of the NCIC report and "couldn't find" them in their files, but they knew that it was in the NCIC as stolen and that is why they picked it up (Tr. 326-342). (It was later disclosed on cross examination of a law enforcement witness from Michigan who did have a copy of the NCIC report that in fact the NCIC report of Mr. Butler's vehicle as being stolen was not made or in essence the vehicle was not reported to the NCIC as stolen until after Mr. Northcutt had taken the vehicle from Mr. Butler.) In essence, what the proof disclosed was that Mr. Northcutt along with others went to pick up the vehicle, checked in it and got the identification data from the VIN number installed by the state in the car and then called Buick in Michigan to give them that number so they could in turn report it as stolen to justify Northcutt picking it up (Tr. 389-390, ex. 28). State officials acknowledge that Buick did not have proper documentation on the Butler vehicle when they came to the state of Tennessee (Tr. 326-342). In any event, on June 12, 1986, agent Northcutt, acting on the power of the state, confiscated and took Mr. Butler's car from him, which he had purchased some ten (10) months prior. Im-

mediately Mr. Butler contacted counsel and the following day appeared in Chancery Court to get a restraining order to restrain the state from disposing of the vehicle or turning it over to Buick before there could be a hearing to determine the one with the right to possession; however, the very next day, the 14th and supposedly before the Restraining Order was served on the state, officials turned it, along with the other vehicles, over to Buick officials, who in turn hustled them out of the state and back to Michigan. Reportedly this vehicle, which Mr. Butler and his wife paid on for approximately three (3) years, has been sitting in a Buick lot somewhere in the state of Michigan waiting for the determination of its lawful owner. Mr. and Mrs. Butler have not had the car since June 12, 1986, but they paid on it for approximately three (3) years to pay off the debt that they made in purchasing it.

When Mr. Butler learned that the car had been taken by Buick back to Michigan, he amended his complaint and included Buick as party Defendant and has been litigating for the past years, trying to get back the car for which he has worked and paid. In addition the Butlers filed suit for damages in Circuit Court against Buick who in turn removed the damage case to Federal Court.

(h) RAISING OF CONSITUTIONAL AND FEDERAL ISSUES

Constitutional issues were raised in the first incidence in the litigation. The lawsuit was first filed, merely to restrain the state, then amended to get possession of the vehicle. The unconstitutionality of the taking of the vehicle was always a question, and was specifically set out in detail in the Complaint for damages upon which the Plaintiff relied upon certain statutes and in particular on the U.S. Constitution and the State Constitution. These are set out in detail under paragraph (f). Also the trial court by Order entered December 4, 1986, in ruling upon a motion for Summary Judgement filed by Buick, denied that Motion for

Summary Judgement and in doing so found as a matter of fact that the state of Tennessee, after titling this subject vehicle to the Butlers, took that vehicle from the Butlers and immediately after taking the vehicle turned the vehicle over to Buick, who in turn removed the car from the state of Tennessee; and that the Plaintiffs thereby, had no opportunity for a hearing or a proceeding with the state or otherwise to prevent the removal of their car from the state. As a result Plaintiffs had no alternative but to seek relief of the Court for this taking.

(i) **NOT APPLICABLE**

(j) **CONCISE ARGUMENT JUSTIFYING ISSUANCE OF WRIT**

The Defendant in this case, a huge influential corporate entity, used its power and influence with lower officials of the state and secured the aid of the state in using state action to obtain possession of that vehicle from Mr. Butler without any due process hearing. Mr. Butler filed two actions to remedy the wrongs done to him. At first a Chancery Action for the recovery of the vehicle was filed, and second a related Circuit Action for the damage to his constitutional rights in the wrongful taking. The damage action was removed from State Court to Federal Court so two actions proceed, one through State channels and one through Federal channels. Defendant has moved for Summary Judgement in the Federal action, contending that the Plaintiffs could have no property interest in the vehicle, which they purchased and for which they had title issued by the state of Tennessee, because the vehicle was in fact stolen, and thus they had no constitutional protection. The Plaintiffs contend that he should have constitutional protection, because of the title to the vehicle which was issued by the state to him, a good faith purchaser of value, and that the title was issued only after checking with Buick and receiving no claim. The state trial court held that this

vehicle was not stolen in the normal sense of the word, and that the Plaintiff should have his vehicle returned to him. The Federal District Judge has ruled that this determination will be binding on parties in the Federal action. The Defendant appealed the Trial Judge's ruling and the Federal Judge stayed the damage action in Federal Court pending the ultimate conclusion of the state action, determining whether or not the vehicle was stolen and the entitlement to the vehicle. The Court of Appeals for the Western Section of Tennessee heard the case, which was appealed to the Middle Section Court and issued an opinion overturning the Chancellor; Application to Appeal to the State Supreme Court was denied. If this Court of Appeals decision on the issue of whether or not the vehicle was stolen is allowed to stand, it will be used as a bar by the Defendant to prevent the Plaintiffs from obtaining recovery for the damages sustained to their constitutional rights as sought in the damage suit. As indicated, the two suits are tied together and, even by Agreed Order, the discovery in one was to be utilized in the other. A hearing of this matter by this Honorable Court is essential to prevent further violation of the Plaintiffs constitutional rights in property as set out by the Fifth and Fourteenth Amendments.

(k) APPENDIX OF ORDERS AND PLEADINGS

The following Orders and or documents are included herein as an appendix to this petition for Certiorari.

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(1) Order of Chancellor Stewart, dated December 2, 1986	20
(2) Complaint for Damages	23
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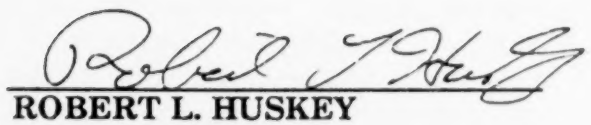
(6) Order of Western Section Court of Appeals, entered February 6, 1991 45
(7) Order by Court of Appeals on Petition to rehear, entered February 27, 1991 55
(8) Tennessee Supreme Court Order entered June 10, 1991. 56

RESPECTFULLY SUBMIITED,



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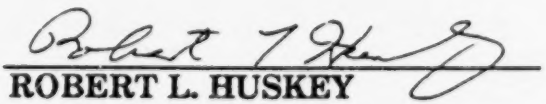
CERTIFICATE OF SERVICE

I certify that on the 5th day of Sept., 1991, I have served three copies of the foregoing pleading upon opposing counsel, the Honorable Albert F. Moore, Neal & Harwell, 2000 One Nashville Place, 150 Fourth Avenue North, Nashville, Tennessee 37219, first class mail, postage prepaid.



ROBERT L. HUSKEY

IN THE CHANCERY COURT OF COFFEE COUNTY, TENNESSEE

DEC. 4, 1986

GEORGE B. BUTLER and wife, LEAH BEA BUTLER,

Plaintiffs,

vs. CIVIL ACTION NO: 86-164

STATE OF TENNESSEE and BUICK MOTOR COMPANY, A DIVISION OF GENERAL MOTORS CORPORATION,

Defendants.

IN RE:1985 Buick
VIN NO: 1G4AX69E6E1400109

ORDER

THIS MATTER CAME ON to be heard on the 30th day of October, 1986, upon the Motion of the Defendant, Buick Motor Company, a Division of General Motors Corporation, to dismiss or in the alternative for summary judgement, by which the said defendant contended that the herein Court does not have jurisdiction or venue to try the matter, contending that it must proceed administratively under the provisions of Tennessee Code Annotated, § 55-5-108.

Upon the hearing of this matter, including the presentation by the representative of the State Attorney General, and in consideration of the sworn answers to the interrogatories filed by the State, and from consideration of the entire file of this cause, from all of which the Court finds that the said Motions of the Defendant, Buick Motor Company, are not well taken and should be denied. In particular, the Court finds that the State after taking the

car titled to Mr. Butler immediately turned that vehicle over to Buick, who in turn removed the car from the State of Tennessee; that the Plaintiffs, Mr. and Mrs. Butler, had no opportunity for any hearing or proceeding with the State or otherwise to prevent the removal of the car from the State, and no alternative but to seek relief in this Court; and finally the Court finds that it is the contention of the State whether rightfully or wrongfully that the vehicle in fact was not taken pursuant to the Code Section relied upon by Buick, but rather was merely taken on the basis of it being claimed to be a stolen vehicle and returned to the party that claimed to own it, Buick.

Based on all the foregoing, the said Motions of the Defendant, Buick Motor Company, a Division of General Motors Corporation, be and same hereby are denied. Based upon the nature of the issue raised by the Defendant, the Court will grant said Defendant an interlocutory appeal should said Defendant choose to pursue same.

To which action of the Court, in overruling its motion to dismiss the Defendant, Buick Motor Company excepts and reserves its exception to the final hearing on the merits in this cause.

ENTER: this the 2nd day of December, 1986.

S-L.F. Stewart

L.F. Stewart, Chancellor

APPROVED FOR ENTRY

ROBERT L. HUSKEY

S-Robert L. Huskey

Attorney for Plaintiffs

I, the undersigned Clerk and Master of the Circuit Court of Tennessee, hereby certify that this is a true and correct copy of the original of this instrument this 4th day of Dec. 1986

Clerk & Master

H.J. GARRETT

S-H.J. Garrett

Attorney for Buick Motor Company

JANE W. YOUNG

S-Jane W. Young
Attorney for State of Tennessee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading has been served upon counsel for all parties at interest in this cause by depositing a true and correct copy of said pleading in the mails of said municipality by placing a true and correct copy of this pleading in the United States Mail, postage prepaid, addressed as follows:

This the 17 day of Nov., 1986.

GAIL T. [illegible]

[illegible]

105 WEST MAIN STREET
MARYVILLE, TENNESSEE

IN THE CIRCUIT COURT
FOR THE FOURTEENTH JUDICIAL DISTRICT, AT MANCHESTER

GEORGE B. BUTLER and wife,
LEAH BEA BUTLER,

Plaintiffs,

Filed In Office 10:30 (A.M./P.M.)
10-13 1987
C. J. Camp
Charlene J. Camp
Circuit Court Clerk

vs. CIVIL ACTION NO: 21,881

BUICK MOTOR COMPANY, A DIVISION OF GENERAL MOTORS CORPORATION, and STATE OF TENNESSEE,

Defendants.

COMPLAINT

COME NOW THE PLAINTIFFS, George B. Butler and wife, Leah Bea Butler, and would show unto this Honorable Court the following:

I.

That the Plaintiffs are citizens and residents of Coffee County, Tennessee. That the Defendant, Buick Motor Company, a Division of General Motors Corporation, is a non-resident corporate entity which is licensed to do business in the State of Tennessee and which sells and distributes motor vehicles within the State of Tennessee through its authorized dealerships. The Defendant, State of Tennessee, is a state governmental entity operating under recognition of the U.S. Constitution and federal laws and the State of Tennessee Constitution and appropriate state statutes.

II.

This litigation is brought pursuant to and in accordance with the following authorities:

(1) "Criminal actions - Provisions concerning - Due process of law and just compensation clauses. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fifth Amendment
United States Constitution

(2) "Citizenship - Due process of law - Equal protection. - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1, Fourteenth Amendment
United States Constitution

(3) "Civil action for deprivation of rights - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

42 U.S.C.S., § 1983

(4) "(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

42 U.S.C.S., § 1985 (3)

(5) "Sec. 17. Open courts - Redress of injuries - Suits against the State. - That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

Article 1, Section 17
Constitition of Tennessee

(6) "Sec. 21. No man's services or property taken without consent or compensation. - That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

Article 1, Section 21
Constitution of Tennessee

(7) "55-5-108. Records to be kept - Inspections - Contraband-Seizure of stolen property - Reclamation - Forfeiture.

Tennessee Code Annotated
§ 55-5-108, et seq.

(8) Common law conspiracy and conversion

(9) Malicious and intentional tort

(10) Outrageous conduct

III.

Plaintiffs would show unto this Honorable Court that in August of 1985 they purchased a subject automobile, being a 1985 Buick, from Gaylen Fann Motor Company and paid a fair and reasonable price for the vehicle in its state and condition at the time of purchase. Pursuant thereto, with Gaylen Fann being the proper title holder of the vehicle at that time under the laws of the State of Tennessee, he obtained and transferred title of said vehicle, pursuant to proper authority and payment, to the Plaintiffs. Attached hereto please find a photocopy of the Certificate of Title number 34288740 issued by the State of Tennessee, Motor Vehicle Division of the Department of Revenue, certifying title to the subject vehicle in the Plaintiffs.

Gaylen Fann is a well known and recognized dealer of motor vehicles in the Manchester, Coffee County area, having been in business and maintaining a favorable reputation for such business for a number of years and known in the area to buy and sell new, used, damaged and reconstructed vehicles. The vehicle in question as purchased from Mr. Fann, although a new car with low mileage, needed a great deal of repair and cleanup which was performed by the Butlers providing many many hours of labor in cleaning the vehicle. This vehicle was of a type and style just as the Plaintiffs had desired and so they with love spent many hours of work cleaning and repairing this car. The car from general appearance at the time of purchase was somewhat of a mess, in that it was covered inside and out with an oily film and layers of a sandy substance; the rear end was jacked out of place causing the car's front end to be almost touching the ground; the upholstery was filthy and the carpets were dirty and greasy. After obtaining the vehicle, the Butlers, realizing its potential, then for the most part disassembled and refitted the car from a layman's point of view, and in essence they spent many many hours making this car into the vehicle they knew it could be.

Plaintiffs actually owned and had possession of the said vehicle from August of 1985 when they purchased it

from Fann Motor Company, and the Plaintiffs had legal title to the vehicle on title issued by the State on a proper Certificate of Title from the State of Tennessee since February 3, 1986, being the date of the issuance of their current Certificate of Title referenced above.

IV.

It developed that this vehicle, as well as other vehicles which had been manufactured by the Defendant, Buick Motor Company, a Division of General Motors Corporation, herein referred to as Buick, had been sold or transferred by a high corporate official of Buick by the name of Mr. Clingingsmith, who was the corporate official in charge of the proving grounds of Buick at Flint, Michigan. A practice had been developed by Mr. Clingingsmith on behalf of Buick over a period of time whereby either vehicles or parts of vehicles that had been utilized in the testing process at the Buick proving grounds were then sold by Buick or Clingingsmith on behalf of Buick to certain distributors or dealerships in the Michigan area and the funds utilized then by Clingingsmith and others involved with the operation at the proving grounds for public relation activities of Buick. In addition to the sale of these such vehicles, some of them were donated to driver training programs and other such activities which would draw favorable public relations for Buick. This general practice had been first developed by Mr. Clingingsmith, who was the head Buick official of the proving grounds at Flint, Michigan, and was known by and accepted by the corporation itself and the benefits therefrom utilized to the benefit of Buick. The general practice in such transaction where the cars had been utilized for test purposes was to remove any test parts from the vehicles so that the cars as delivered or parts as sold would be as the normal dealership vehicles. As indicated above, it developed that this vehicle, as well as other vehicles, passed in this chain of transfer from Buick to a man named Nicolay and a man named Holloway, and then in turn were ultimately sold to Gaylen Fann Motor Company of Manchester, Coffee

County, Tennessee, and then in particular this vehicle, a 1985 Buick, being Vehicle Identification Number 1G4AX69E6E1400109, was then in turn sold through the normal course of business to your Plaintiffs.

V.

It thereafter developed and was determined by other officials of Buick that in addition to Mr. Clingingsmith and others utilizing the practice of disposition of vehicles for the benefit of Buick in its public relations, that he was also keeping part of the proceeds for himself, and further that he, in the course of carrying on this practice, had allowed certain vehicles, including the one which was ultimately sold to your Plaintiffs, to be sold, transferred or otherwise with experimental equipment thereon. This prompted Buick and its officials to seek to recover this vehicle at all costs, including the deprivation of the rights, property and interest of your Plaintiffs.

Meanwhile, your Plaintiffs who owned by proper title and registration the subject vehicle, had made no secret of their proud ownership of this vehicle and had in fact made contact with the Buick dealership and direct contact with the Buick corporation pertaining to some of the equipment on their new Buick vehicle. Buick and its officials, however, once they realized that not all of the test equipment had been removed from the Butler vehicle before it was transferred or conveyed, sought to recover this and other vehicles that might have similar equipment. Rather than contacting your Plaintiffs directly, who had had individual contact with Buick about the vehicle, Buick officials and in particular officials of the security department of General Motors Corporation who were well familiar with the practice by which the vehicles were transferred into commerce, made contact with officials of the State of Tennessee, claiming the vehicles, and in particular your Plaintiffs' vehicle, were stolen vehicles and should be returned to Buick immediately. The State of Tennessee accepted the contentions of the Buick officials without proper verification of any ownership

or entitlement on the part of Buick officials, and in fact they failed to have proper documentation or proper entitlement to ownership and in turn went with Buick officials and on behalf of Buick officials under the color and authority of the State of Tennessee, using police authorities of the Department of Safety and in particular J.C. Northcutt, investigator of the Tennessee Department of Safety, and L.D. Moiree of the Department of Safety, and with the power and authority of the State of Tennessee on behalf of Buick went to the place of employment of your Plaintiff, George B. Butler, without any warrant or other official process as though Mr. Butler were a criminal or a thief, and under the authority and power of the State took physical possession of his new vehicle from him on June 12, 1986, leaving your Plaintiff only a pink copy of a Notice of Impoundment (copy attached hereto) which reflected that the vehicle was impounded by the State and advised Mr. Butler then where the vehicle would be maintained at the State impoundment lot in Tullahoma, Coffee County, Tennessee. Your Plaintiffs would show that the Defendants and each of them conspired together to obtain the personal property of your Plaintiffs from them without proceeding through due process of law, and thereby deprived your Plaintiffs of their right to property under the Constitution of Tennessee and the Constitution of the United States, that the State acted on behalf of the Buick officials without proper authority and without proper documentation and not following proper State procedures for the obtaining of the property.

VI.

Following the taking of the property by the State officials on behalf of Buick, your Plaintiffs immediately that same night sought the aid of counsel and the next morning filed an action in Chancery Court, being the 13th day of June, 1986, and sought and obtained a Restraining Order restraining the State of Tennessee from removing the vehicle from the State or from turning it over to Buick or allowing it to be disposed of or destroyed. Meanwhile, the very next

day before the process was actually served upon the State formally, the State contrary to due process rights and equal protection rights of the Plaintiffs and contrary to the statutes of the State of Tennessee, delivered the Butler's vehicle to the officials of Buick on the morning of Saturday, June the 14th, which officials immediately transported that vehicle out of the State and jurisdiction of its courts. Although action is pending for the return of that vehicle in the Chancery Court of Coffee County, that vehicle has never been returned to the State of Tennessee and your Plaintiffs have been out their money and out their vehicle and the use of their vehicle ever since, now for a period of which has been nearly a year.

VII.

Your Plaintiffs would show unto this Honorable Court that the Defendant, Buick, determined that it wanted to regain possession of the Butler's vehicle and was willing to do so at whatever cost, including specifically the deprivation of the rights, both constitutional and statutory, of the Butlers in and to that vehicle; that the Buick officials in conjunction with the State officials wrongfully converted property which was properly titled to the Butlers from them and removed it from the State of Tennessee in violation of statutory and constitutional rights of the Butlers; that this action was taken by Buick with the aid of the State for the purpose of recovering that vehicle at whatever cost; that the vehicle in question was not a stolen vehicle, but rather was one placed in the course of commerce by officials of Buick, which corporation acts through its officials, and under a practice that was known, that had been established and existed at the proving grounds for a period of time and carried on by Buick officials; that the Butlers were the proper and legal owners of the vehicle in question under the laws of the State of Tennessee, but that the Defendant, Buick, by aid and conspiracy with officials of the State of Tennessee influenced by the power, size and corporate wealth of the said Defendant, aided the Defendant, Buick,

in obtaining possession of the subject vehicle from the Butlers without due process by use of the power of the State. Plaintiffs would show that the vehicle of the Plaintiffs should never have been impounded by the State in the use of the State's power, but even that if there was authority and propriety for the impoundment, that the State law provides a procedure for such impoundments, which procedure will require that the State hold the vehicle for the protection of all concerned and cannot turn that vehicle over to a claimant unless it appears that there is only one claimant to the vehicle and then only upon making bond for twice its value, while in this case it was clear and well known to the State officials that there were at least two claimants to the vehicle, that being Buick and your Plaintiffs and that under that circumstance under State law the vehicle could not be turned over to anyone; yet despite this the State officials took the Butler vehicle which was properly titled to them under the laws of this State and on a title issued by the State itself, and after taking their vehicle less than 48 hours thereafter turned that vehicle over to Buick contrary to State law, whereupon Buick immediately rushed that vehicle out of State before the Butlers could, through the court process, block the removal of the car, while all the time a Restraining Order had been issued and was in circulation for service upon the State preventing that very thing.

VIII.

Plaintiffs would show that the Defendant, State of Tennessee, and the Defendant, Buick, intentionally and willfully violated your Plaintiffs' right to property, wrongfully converted their property, taking their property without due process of law and in violation of the Equal Protection Clause of the law, and removed and converted their property in violation of the above referenced state and federal constitution and state and federal statutes, and further in violation of common law conversion and common law conspiracy, and that said action and conduct on their part, and each of them, constitutes all the above and in addition

thereto an outrageous conduct whereby a huge wealthy corporate entity such as the Defendant, Buick, by use of its power and influence obtained the usage of the power and authority of the State to wrongfully and intentionally deprive the Plaintiffs of their property.

WHEREFORE AND FOR ALL, your Plaintiffs sue the Defendants and each of them under the above said facts, under the theories elucidated above and all other legal theories applicable under those facts, and demand judgment against them for all their entitlements at law, for the value of the vehicle, loss of its use, for the deprivation of their rights and for applicable punitive damages, and would seek judgment against the Defendants in the amount of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) compensatory damages and TWENTY-FIVE MILLION DOLLARS ($25,000,000.00) punitive damages, and would respectfully demand a jury to try this case.

RESPECTFULLY SUBMITTED,

ROBERT L. HUSKEY

S-Robert L. Huskey

Attorney for Plaintiffs
P.O. Box 439
105 E. High Street
Manchester, TN 37355

IN THE CHANCERY COURT
OF COFFEE COUNTY, TENNESSEE

GEORGE B. BUTLER, and wife, LEAH BEA BUTLER,

Plaintiffs,

vs.

BUICK MOTOR COMPANY, a division of General Motors Corporation

Defendant.

FILED

JAN. 3, 1989

CLERK & MASTER
COFFEE COUNTY, TN

NO: 86-164

ORDER

This matter came on to be presented before the Honorable L.F. Stewart, Chancellor, Chancery Court of Coffee County, Tennessee, on the 9th day of December, 1988, upon the Motion of the Defendant, Buick Motor Company, division of General Motors Corporation, to delay this litigation until after the trial of the related suit in Federal Court.

Upon the Presentation of the matter to the Court the Court finds that the motion of the Defendant should be denied; however, as an alternative, the Court grants a continuance of the case from the presently scheduled trial date of January 16, 1989, to a later date of May 16, 1989. It is further ordered that the discovery taken in this and the related case will be taken in such a manner that it can be utilized in either case thus eliminating duplication of expenses.

IT IS THEREFORE ORDERED;

(1) That the motion of the Defendant stay proceedings in this action is hereby denied.
(2) The trial of this case is continued from January 16, 1989, and is hereby scheduled for trial on May 16, 1989.
(3) Discovery taken in this case and in the related Federal case by agreement may be utilized in either of the actions pending between these parties.
ENTER: This the 31st day of December, 1988.

S-L.F. Stewart
L.F. Stewart

APPROVED FOR ENTRY

ROBERT L. HUSKEY
S-Robert L. Huskey
ATTORNEY FOR PLAINTIFFS

I, the undersigned Clerk and Master do hereby certify that this is a true and correct copy of the original of this instrument this 3 day of Jan 19 89
Clerk & Master

NEAL & HARWELL
S-Albert F. Moore
ATTORNEYS FOR DEFENDANT

****

CERTIFICATE OF SERVICE

I, Robert L. Huskey, certify that I have served a copy of the foregoing proposed Order, to the Honorable Al Moore of the Firm of Neal & Harwell, 2000 One Nashville Place, 150 Fourth Avenue North, Nashville, TN 37219-2414, First Class, Postage Pre-Paid, this the 21st day of December, 1988.

S-Robert L. Huskey
ROBERT L. HUSKEY

IN THE CHANCERY COURT OF COFFEE COUNTY, TENNESSEE

GEORGE B. BUTLER and wife LEAH B. BUTLER,

Plaintiffs,

vs.

BUICK MOTOR COMPANY, a division of General Motors Corporation, et al.

Defendant.

FILED

AUG. 11, 1989

CLERK & MASTER
COFFEE COUNTY, TN

Civil Action No: 86-164

I, the undersigned Clerk and Master do hereby certify that this is a true and correct copy of the original of this instrument this 11 day of Aug, 19 89

Clerk & Master

FINAL ORDER

This matter came on for trial before the Honorable L.F. Stewart, Chancellor of the Chancery Court of Coffee County, Tennessee on the 17th, 18th and 19th days of July, 1989, to determine which of the two parties were entitled to possession of the subject Buick automobile. At the conclusion of the trial of the case, including the presentation of witnesses, exhibits and arguments of counsel, the Court announced its finding, which findings and rulings have been transcribed and filed with the Court and which are adopted herein by reference; and based thereupon, the Court holds that the Plaintiffs, George Butler and wife, Leah Bea Butler, are entitled to the possession and return of the subject Buick automobile; and IT IS, THEREFORE, ORDERED, that the Defendant, General Motors Corporation, return the subject Buick automobile to the Butlers. Court costs are adjudged against the Defendant for which execution may issue if necessary.

ENTER: this the 11th day of August, 1989.

S-L.F. Stewart

L.F. STEWART, CHANCELLOR

APPROVED FOR ENTRY:

ROBERT L. HUSKEY

S-Robert L. Huskey

Attorney for Plaintiffs,
George and Leah Butler

CERTIFICATE OF SERVICE

I, Robert L. Huskey, certify that I have served a copy of the foregoing proposed order upon opposing counsel, the Honorable Albert F. Moore, by mailing a copy to his law offices of Neal & Harwell, 2000 One Nashville Place, 150 Fourth Avenue North, Nashville, Tennessee 37219-2417, First Class Mail, Postage Pre-Paid, this the 10th day of August, 1989.

S-Robert L. Huskey
ROBERT L. HUSKEY

TRANSCRIPT OF STENOGRAPHIC RECORDING OF PROCEEDINGS
IN THE CHANCERY COURT FOR COFFEE COUNTY, TENNESSEE AT MANCHESTER

GEORGE B. BUTLER, and wife,
LEAH BEA BUTLER,

Plaintiff,

vs. NO. 86-164

BUICK MOTOR COMPANY,

Defendant.

APPEARANCES:

FOR THE PLAINTIFFS:

Robert L. Huskey, Esq.
514 Hillsboro Boulevard
Manchester, Tennessee

FOR THE DEFENDANT:

Albert F. Moore, Esq.
Neal & Harwell
2000 One Nashville Place
Nashville, Tennessee

This cause came on to be heard on the 17th, 18th and 19th days of July, 1989, before the Honorable L. F. Stewart, Chancellor presiding over the Chancery Court in and for Coffee County, State of Tennessee, at the Coffee County Courthouse, Manchester, Tennessee, when the following proceedings were had and evidence introduced, to-wit:

PROCEEDINGS

(Thereupon other proceedings were reported, but are not transcribed herein.)

THE COURT: I think the facts of this case are pretty well understood by all. Basically the facts that I need to find are simply this: GM made a test vehicle and sent it to Detroit. It became the property at that time --according to Mr. Barcomb -- of the engineer. A number of people there drove it testing it to complain about its functionings as a vehicle just to be driven around. Then he ordered it sent to Milford Proving Grounds where Mr. Jack Clingingsmith was the general supervisor and took charge of the vehicle. I'm not clear what all was done at that point, but Mr. Barcomb said he ordered it crushed. Mr. Clingingsmith, being the general supervisor, was the agent for General Motors -- the corporation can't act otherwise -- and instead of crushing it, he forged some papers or did something fraudulent here and turned it over to a Mr. Nicholay, I believe his name was, who, in turn, gave it to Mr. Holloway who, in turn, sold it to Mr. Gene Taylor or through Mr. Gene Taylor to Mr. Fann here in Manchester. Mr. Butler came by Mr. Fann's place, looked at it, saw it, liked it and purchased it. The VIN number had been removed by Mr. Clingingsmith's mechanic in Detroit and had been turned into General Motors headquarters. The title had been sent to the Secretary of State of Michigan surrendering it so when that vehicle arrived here in Manchester it had no title and it had no VIN number. Mr. Fann makes application for -- let's see, what do you call those things he --

MR. MOORE: (Interposing) Permit to Dismantle.

THE COURT: On the back of that he had a right to sell it to somebody else and he endorsed it over to Mr. and Mrs. Butler and they made application for title and title was issued to them. It had the same VIN number on it, as I understand it, as the General Motors VIN number that was removed from it. Now, if it were a situation where Mr. Nicholay had gone over the fence at the Milford Proving Grounds and cut a hole in it and driven this vehicle off, we wouldn't be here right now because that would be clearly a stolen vehicle that passes no title whatsoever. If Mr. Nicholay had been in league with a night watchman or a mechanic and gotten possession of it in that fashion, there wouldn't be any question about it because no title could pass.

Our problem in this case is that Jack Clingingsmith was the general supervisor in charge to see that it was crushed and then of disposing the crushed vehicle by selling it to someone else. He had some authority and was the agent of General Motors. It's not exactly the Jernigan case, Mr. Huskey, because in the Jernigan case the owner actually gave his authority to sell it. He gave his consent for the sale. He was tricked out of it. Mr. Clingingsmith, on the other hand, has repetitiously and fraudulently delivered the vehicle to Mr. Nicholay covering his trail by turning in the VIN number and doing the necessary paperwork that appeared that that vehicle had been crushed.

In this situation we have a General Motors agent disposing of the property illegally, fraudulently -- there's no question about that -- embezzling. The question in our mind comes, could title arise in a good faith purchaser. I don't think there's any question about Mr. Butler or Mr. Fann being good faith purchasers. They knew nothing of this. They had no understanding of it whatsoever. Mr. Butler and Mr. Fann both gave good money for the vehicle. Under these circumstances I think we would invoke a rule of equity which says that between two parties one must suffer a loss. The ones who had suffered the loss who were not responsible for the action or negligence that set about the loss. General

Motors certainly was responsible for Mr. Clingingsmith. They had no check on him and allowed him through their failure to dispose of this vehicle as he did to the detriment of Mr. and Mrs. Butler and for that reason I think I'm going to order General Motors to return the vehicle to Mr. and Mrs. Butler.

MR. HUSKEY: Thank you, your Honor.

MR. MOORE: Your Honor, the vehicle, as I understand it, is on a lot somewhere in Michigan and it's been sitting there for about two and a half years so it's not in the best of shape. I'm not sure what General Motors intends to do in terms of the possibility of appealing the decision of the Court, but I suppose just from my perspective in trying to determine what your Honor wants to do in this case I think that there's a good dispute, a fair dispute, an honest dispute between the counsel here about what law applies and I guess that I would ask your Honor's permission to stay any order requiring us to bring the car down until the matter can be considered.

THE COURT: Post a bond, yes, sir. You have the right to do that.

MR. MOORE: Should I file a motion or something to that effect?

THE COURT: Well, I think you just have and I see no reason why you shouldn't have that right.

MR. MOORE: Your Honor, it would be difficult to put a value on a bond at this point.

MR. HUSKEY: That's what I was going to ask you about.

MR. MOORE: Is that something that perhaps Mr. Huskey and I could talk about and –

THE COURT: (Interposing) You all talk it over and see if you can get to it. If you can't, I will. I'll give you two minutes to do it.

MR. MOORE: Thank you.

REPORTER'S CERTIFICATE

STATE OF TENNESSEE :
:
COUNTY OF COFFEE :

I, Valerie P. Smith, being a Court Reporter and Notary Public at Large for the State of Tennessee, do hereby certify that I reported in machine shorthand the case of GEORGE B. BUTLER and wife, LEAH BEA BUTLER vs. BUICK MOTOR COMPANY, on the 17th, 18th and 19th days of July, 1989, in the Chancery Court of Coffee County before Chancellor L. F. Stewart; that the foregoing pages constitute a true record of the Chancellor's Ruling in the above-entitled case.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand and seal in the City of Tullahoma, County of Coffee, State of Tennessee, this 28th day of July, 1989.

S-Valerie P. Smith

_____

Valerie P. Smith
Notary Public and
Court Reporter

My Commission Expires
April 21, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

GAYLEN FANN, GENE TAYLOR,
GAYLEN FANN ENTERPRISES,
GEORGE B. BUTLER and wife,
LEAH BEA BUTLER,

Plaintiffs

v.

Civ. 4-87-087
Civ. 4-87-088

BUICK MOTOR COMPANY,
a division of General Motors
Corporation, et al.,

Defendants

ORDER

This action is hereby CONTINUED from its present trial date and STAYED pending resolution by a Tennessee Court of Appeals of the pending state court action between the Butlers and General Motors.

ENTER:

S-James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT JUDGE

APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT:

RE: TIME

JUDGEMENT ENTERED ON THIS DATE: FEB. 6, 1991

Application for permission to appeal shall be filed with the Clerk of the Supreme Court WITHIN THIRTY (30) DAYS after the date of entry of the judgement of the Court of Appeals or Court of Criminal Appeals [Rule 11 (b) Tennessee Rules of Appellate Procedure].

v.

01-A-01-9003-CH-00101

BUICK MOTOR COMPANY, a division of GENERAL MOTORS CORPORATION

L. F. STEWART
Chancellor

Defendant/Appellant.

ROBERT L. HUSKEY, Manchester, Attorney for Plaintiffs/ Appellees

ALBERT F. MOORE, of NEAL & HARWELL, Nashville, Attorney for Defendant/Appelant

REVERSED AND DISMISSED

OPINION FILED: FEB. 6, 1991

TOMLIN, P.J., W.S.

George B. Butler and wife, Leah Butler, (hereafter "Plaintiffs" or "Butler") initiated this suite in the Chancery Court of Coffee County against Buick Motor Company, a division of General Motors Corporation, ("defendant" or "Buick"). Plaintiffs sought to regain possession of a 1985

Buick Electra Park Avenue automobile they had purchased from Gaylen Fann Auto Sales, Inc. ("Fann"), a used car and auto salvage dealer in Manchester, after the vehicle had been confiscated by a department of the state of Tennessee and possession surrendered to Buick. Following a bench trial, the chancellor held that Butler had acquired title to the automobile and was entitled to its possession.

Buick raised three issues on appeal contending that the chancellor erred in: (1) holding that plaintiffs acquired good title to the automobile on the ground that as innocent purchasers for value they bought the car from one holding a voidable title; (2) incorrectly applying an equitable maxim to the facts of this case; and (3) exercising jurisdiction and thereby hearing the case prior to plaintiffs' exhausting their administrative remedies. Our resolution of the first issue disposes of this litigation. We accordingly pretermit the second and third issues and reverse and dismiss.

Many of the material facts are undisputed. We would state parenthetically that inasmuch as we do not address the issue pertaining to the exhaustion of administrative remedies, we will touch on those facts tangentially as we relate the facts material to the primary issue.

The automobile which is the subject of this suit was what the trade would consider a "prototype test vehicle" or "pre-production" model. It was one of approximately 250 test vehicles similarly produced and tested by GM. These vehicles could not be approved for sale to the public because many of the parts on the cars had not been certified for inclusion on a production model automobile by the Department of Transportation. The automobile was built by General Motors in August, 1983, and was originally shipped that same month to its GM Buick Division in Flint, Michigan. There it was used by management-level GM employees for transportation on the public highways of Michigan. The automobile was evaluated and critiqued by the various employees who drove and used it. It was shipped with a certificate of origin from the GM factory and was appropriately titled and licensed for use on the public roads. It was

a style and series that was ultimately produced and sold to the public in 1985

After about a year and one-half of testing, Buick determined that the automobile had undergone an adequate testing process at Flint, and on February 19, 1985, the automobile in question was transported to GM's proving ground in Milford, Michigan ("Milford"). Milford consists of approximately 4,000 acres of GM-owned property, and includes a variety of test facilities such as a test track, wind tunnels, salt baths, robotics, and other testing procedures. Current and future products are regularly tested for safety and durability. The testing at Milford is done in order to obtain federal certification of certain vehicles. None of the vehicles used for testing is sold to the public.

At the time the automobile in question was delivered to Milford, Buick requested that the plate bearing the vehicle identification number ("VIN"), located on the dashboard, be removed. The VIN plate was removed from the subject automobile and returned to the appropriate office in Flint. At the same time the certificate of title that had been issued in the name of Buick engineering in Flint was surrendered to the Secretary of State. The surrender of the title certificate to the Michigan Secretary of State and the removal of the publicly-displayed VIN plate prevented and inhibited the possibility of unlawful transfer of title to this vehicle.

Jack L. Clingingsmith ("Clingingsmith") was employed by GM as a supervisor in charge of driver training and durability testing at Milford. In that capacity he was permitted to use vehicles such as the subject automobile as "yard cars" for transportation on and about the proving ground itself but not on the public roads of Michigan. When the cost of maintaining a "yard car" exceeded its usefulness, it was destroyed in accordance with standing orders. Standard scrapping orders accompanied the subject car when it arrived in Milford. It was not part of Clingingsmith's duties to scrap the car, but it was his responsibility to witness the scrapping and to document its destruction.

From the time the subject vehicle was produced and delivered to the Buick Division in Flint, it was GM's intention that it would end up as scrap.

Without GM's knowledge and authority, Clingingsmith disposed of the subject automobile, along with others, by selling it as an operating vehicle to Mr. Ingo Nicolay, an employee of a used-car lot in Michigan. Clingingsmith covered the transfer of the subject automobile and others to Nicolay by a false paper trail. He supplied false documents to Buick at Flint indicating that this automobile had been reduced to scrap. Nicolay transferred the vehicle to Donald Holloway, who operated an automobile salvage yard in Michigan. Neither Nicolay nor Holloway was employed by GM. Both of them were aware that Clingingsmith did not have the authority to sell the subject auto or the other vehicles, but they went ahead and accepted the automobiles without properly endorsed certificates of title or the required VIN plates in violation of state and federal law.

Gene Taylor was a buyer and salesman for Fann. Taylor and Fann formed a joint venture in connection with the buying and selling of these untitled and non-VIN-plated test vehicles. Taylor acquired the subject automobile and others from Holloway, with only a bill of sale to document the transfer. Holloway did not furnish Taylor with a certificate of title or other documents verifying his ownership, but neither did he conceal the fact that the VIN plate had been removed. Taylor testified that he never dealt with Clingingsmith or anyone else at GM in connection with purchasing these automobiles. He dealt only with Holloway. Taylor further testified he understood that the cars were to be used for parts and that he sold them for parts only. He stated that he never made any investigation about the title to the vehicle.

When this and other automobiles arrived in Tennessee, Fann applied to the state of Tennessee for a "permit to dismantle" each vehicle. The permit issued by the Department of Revenue was required in order to disassemble a

vehicle so that the component parts could be sold separately.

Taylor testified he had purchased "test cars" from other manufacturers, but he had never before purchased test cars manufactured by GM. Taylor further testified he "could have" told GM investigators that he did not "intend to sell the cars to anyone to be driven around in Tennessee."

At the time Fann sold the subject automobile to the plaintiffs, he endorsed over to them the certificate to dismantle. Plaintiffs, however, did not intend to disassemble the vehicle and sell its parts. To the contrary, on the day of purchase in August, 1985, they applied to the Tennessee Department of Revenue for a "reconstructed title," submitting the "permit to dismantle" as proof of ownership. In October, following plaintiffs' application for a certificate of title, the state of Tennessee requested that plaintiffs take the automobile to the Tennessee Highway Garage in Tullahoma for inspection. In February of the following year a certificate of title was issued to plaintiffs by the Department of Revenue.

The inspection of the subject auto resulted from an ongoing investigation that began in the fall of 1985. The investigation involved automobiles Fann sought to have titled that were not accompanied by necessary supporting documents. The issuance of the title to Butler was delayed somewhat during the investigation. The title was issued, however, before the Tennessee Department of Revenue ascertained with certainty that the automobile had been stolen from GM.

Once the result of the investigation into the status of this and similar automobiles became known to Taylor, Fann, and the state of Tennessee, Taylor supplied information to GM security officers that led to Clingingsmith. Upon learning that he had stolen the test vehicles and disposed of them, GM discharged Clingingsmith. Ultimately, Clingingsmith, Nicolay, and Holloway were summoned to appear in the United States District Court for the Eastern District of Michigan. There they pled guilty to and were

convicted of conspiracy to traffic in motor vehicles without identification numbers.

As a result of this investigation, the Tennessee Department of Safety impounded the subject automobile and delivered it to a member of the Security Department of GM, who returned it to Michigan. The Tennessee Department of Revenue later revoked the plaintiffs' "reconstructed title." Following the impoundment, plaintiffs filed suit against the state of Tennessee. They alleged that they had proper title and were entitled to possession of the vehicle. Shortly thereafter, plaintiffs amended their complaint to include as defendant Buick Motor Company, a division of GM, and asked the trial court to determine who was the proper party entitled to the automobile. The state was later dismissed from the lawsuit by an order agreed to and entered by plaintiffs.

I. PLAINTIFFS' TITLE -- VOID OR VOIDABLE?

The trial court rejected the case of Jernigan v. Ham, 691 S.W.2d 553 (Tenn. App. 1984), as authority for ruling in favor of plaintiffs. The chancellor ruled that plaintiffs were good-faith purchasers from a seller who had a voidable title, and they were entitled to claim title as well as possession.

Whether the title was void or voidable, however, depends upon whether Clingingsmith had the authority to dispose of the vehicles in the way he did. Necessarily, we look to the actions of both GM and Clingingsmith to see if such authority existed. First, the proof shows that GM caused the VIN plate to be removed from the vehicle. GM also delivered the vehicle's title certificate to the Michigan Secretary of State, which prevented the lawful transfer of the vehicle under the laws of Michigan. It is undisputed that GM contemplated the destruction of this automobile at the end of its useful life and had taken appropriate steps to have it destroyed. However, Clingingsmith's sale of the vehicle thwarted its destruction.

Furthermore, plaintiffs failed to show that Clingingsmith had the actual or ostensible agency authority to do what he did--sell and dispose of GM property. Both Butler and Taylor admitted they never dealt with Clingingsmith or any other- GM employee in connection with the purchase of this automobile. To the contrary, Butler dealt exclusively with Gaylen Fann.

To establish their claim of good title as good faith purchasers for value, plaintiffs rely upon a section of the U.C.C., codified as T.C.A. § 47-2-403, which reads in pertinent part as follows:

> **47-2-403. Power to transfer -- Good faith purchase of goods -- "Entrusting." --** (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:
>
> • • • • •
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

Although it is not clear from the chancellor's opinion, he may have had the above Code section in mind when he made the following observation in his memorandum opinion:

> Now, if it were a situation where Mr. Nicholay [sic (Nicolay)] had gone over the fence at the Milford Proving Grounds and cut a hole in it and driven this vehicle off, we wouldn't be here right now because that would be clearly a stolen

> vehicle that passes no title whatsoever. If Mr. Nicolay had been in league with a night watchman or a mechanic and gotten possession of it in that fashion, there wouldn't be any question about it because no title could pass. . . . Mr. Clingingsmith, on the other hand, has repetitiously and fraudulently delivered the vehicle to Mr. Nicolay covering his trail by turning in the VIN number and doing the necessary paperwork that appeared that that vehicle had been crushed.
>
> In this situation we have a General Motors agent disposing of the property illegally, fraudulently -- there's no question about that -- embezzling.

The principle of law that we find to be applicable is well stated in 63Am.Jur.2d Property § 44, which reads in part as follows:

> §44. Theft of personal property as affecting owner's title and rights.
>
> The theft of goods or chattels does not divest one who owns, or has title to, such property from his ownership of the property; the owner may follow and reclaim the stolen goods wherever he may find them, even if such goods have been changed or improved.

This rule has long been applied by the courts of this state. In Insurance Co. of North America v. Cliff Petit Motors, Inc., 513 S.W.2d 785 (Tenn. App. 1974), it was declared that the subsequent purchaser of stolen property, however innocent he may be, does not acquire title to the property (citing cases). In so holding the court stated:

> The aforementioned rules remain the law in Tennessee, therefore, it necessarily follows that Judy Faye Woods [the ultimate purchaser] had neither a legal or equitable interest in the stolen vehicle; but rather, she had only a bare possessory interest therein.

Id. at 787.

The proof is uncontradicted that Clingingsmith, without GM's consent or authority, unlawfully and feloniously misappropriated several GM automobiles, including the one involved in this litigation. He unlawfully sold the subject automobile, without a certificate of title or VIN plate, to Nicolay, who in turn sold it to Holloway, who acted as a distributor of this and other stolen automobiles. Without knowledge of these larcenous acts, Taylor purchased the automobile, accompanied by a bill of sale, from Holloway. Ultimately, the automobile appeared on the lots of Gaylen Fann's Auto Sales and was sold to the plaintiffs under an endorsed title to dismantle.

We find that Clingingsmith had no authority to dispose of the automobile at all. Inasmuch as he was without such authority, his actions constituted theft. All purchasers of the subject automobile thus took possession with void title. At all times GM remained the true owner. Under these circumstances, we hold that plaintiffs acquired neither a legal nor an equitable interest in the vehicle that could prevail over the rights of GM. Plaintiffs acquired nothing more than a possessory interest.

GM, being the true owner of the automobile, is entitled to its possession. Accordingly, the decree of the chancellor is reversed. Costs in this cause on appeal are taxed to plaintiffs, for which execution may issue if necessary.

S-Tomlin

TOMLIN, P.J., W.S.

S-Highers

HIGHERS, J. (Concurs)

S-Farmer

FARMER, J. (Concurs)

APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT:

RE: TIME

JUDGEMENT ENTERED ON THIS DATE: FEB. 27, 1991

Application for permission to appeal shall be filed with the Clerk of the Supreme Court WITHIN THIRTY (30) DAYS after the date of entry of the judgement of the Court of Appeals or Court of Criminal Appeals [Rule 11 (b) Tennessee Rules of Appellate Procedure].

v.

COFFEE CHANCERY
NO. 01-A-01-9003-CH-000101

BUICK MOTOR COMPANY, a division of GENERAL MOTORS CORPORATION,

Defendant/Appellant

ORDER ON PETITION TO REHEAR

Appellant's Petition to Rehear is denied.

ENTER: This 27th day of February, 1991.

S-Tomlin
TOMLIN, P.J., W.S.

S- Highers
HIGHERS, J.

S-Farmer
FARMER, J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GEORGE B. BUTLER AND WIFE,
LEAH B. BUTLER,

Plaintiffs-Appellants,

FILED

JUNE 10, 1991

A.B. NEIL, JR., CLERK

v.

Coffee County Chancery Court
Civil Action No. 86-164

Court of Appeals Docket No.
01-A-01-9003-CH-00101

BUICK MOTOR COMPANY, A DIVISION
OF GENERAL MOTORS CORPORATION,

Defendant-Appellee.

ORDER

Upon consideration of the application for permission to appeal filed by the Appellants, the answer of the Appellee, the briefs of counsel and the entire record, it is the decision of the Court that the application be and the same is hereby denied.

PER CURIAM

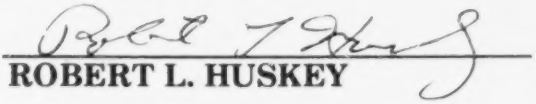
Counsel, Trial Judge, c/c Trial Clerk

RESPECTFULLY SUBMIITED,

ROBERT L. HUSKEY
(Counsel of Record)
P.O. Box 777
514 Hillsboro Blvd.
Manchester, TN 37355

CERTIFICATE OF SERVICE

I certify that on the 5th day of Sept., 1991, I have served three copies of the foregoing pleading upon opposing counsel, the Honorable Albert F. Moore, Neal & Harwell, 2000 One Nashville Place, 150 Fourth Avenue North, Nashville, Tennessee 37219, first class mail, postage prepaid.



ROBERT L. HUSKEY